SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 769

SENTA S. ROGERS,
Petitioner

v.

LUTHER H. HODGES,
Secretary of Commerce;
DR. ALLEN V. ASTIN,
Director, National Bureau of Standards;
JOHN W. MACY, JR.,
ROBERT E. HAMPTON,
FREDERICK J. LAWTON,
Commissioners,
United States Civil Service Commission,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In The

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Senta S. Rogers,

Petitioner

v.

Luther H. Hodges,
Secretary of Commerce;
Dr. Allen V. Astin,
Director, National Bureau of Standards;
John W. Macy, Jr.,
Robert E. Hampton,
Frederick J. Lawton,
Commissioners,
United States Civil Service Commission,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Senta S. Rogers, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on November 9, 1961, affirming a judgment of the United States District Court for the District of Columbia.

OPINION BELOW

The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. The opinion is printed in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was dated November 9, 1961, and entered on the same date. (R. 77) Rehearing was denied on December 6, 1961, and the opinion was amended on the same date. (R. 84) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether it was a denial of due process under the Fifth Amendment to separate a Federal Government employee from her position in the classified Civil Service in a reduction in force proceeding, pursuant to a notice from which the employee did not appeal within the ten-day period allowed therein, when it was known to the Personnel Officer who sent the notice and to the other responsible officers and employees of the agency that the employee was then a patient in an out-of-town hospital under treatment for mental disorder and was incapable of understanding the nature of the proceeding or of acting to protect her rights and interests.

2. Whether it is a denial of due process under the Fifth Amendment to deny such employee an extension of time in which to file her appeal despite the employee's explanation that she was unable to file her appeal on time because she was in a hospital under treatment for a mental disorder.

3. Whether it was a denial of due process under the Fifth Amendment to refuse to consider such employee's

appeal on its merits when it became known to the authorities denying consideration that the employee was under physical and mental disability that prevented filing of her appeal sooner than she did file it.

4. Whether the Civil Service Commission and its employees acted arbitrarily and capriciously, and violated applicable Federal laws and regulations, in refusing to consider such employee's appeal on its merits, when such refusal was based upon their obvious mistake and distortion of the employee's explanation of why she did not file her appeal on time.

5. Whether the Civil Service Commission and its employees acted arbitrarily and capriciously, and violated applicable Federal laws and regulations, when they refused to consider the employee's appeal on its merits, when they knew that the employee's delay in filing the appeal was caused by a serious mental disorder.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS INVOLVED

That part of the Fifth Amendment to the Constitution of the United States is involved that provides that no person shall "be deprived of life, liberty or property without due process of law."

The statutes involved are the Act of June 27, 1944, c. 287, Sec. 11; 58 Stat. 390; the Act of June 27, 1944, c. 287, Sec. 12, 58 Stat. 390; and the Act of June 27, 1944, c. 287, Sec. 19, 58 Stat. 391. They are printed in Appendix B, infra, pp. 18-19.

The regulations involved are 5 CFR 1957, Supp. 20.9 21 F. R. 8915, Nov. 16, 1956; 23 F. R. 7421, Sept. 24, 1958 (amending 5 CFR 1957 Supp. 20.9); Federal Personnel Manual, page R-4-33 (Issued with Transmittal Sheet No. 567); and 5 CFR 9.102(a)(1), 19 F. R. 8615, Dec. 16, 1954. They are printed in Appendix B, infra, pp. 19-22.

STATEMENT

Petitioner was a chemist in the classified Civil Service, employed in the National Bureau of Standards, Department of Commerce, from June 27, 1955, to May 31, 1958, on which latter date she was separated in the reduction in force proceeding of which she complains. On December 19, 1957, petitioner's mother was told by the Medical Officer and a Personnel Officer of the Bureau of Standards that petitioner was incompetent and emotionally unstable and would be removed from her position. (R. 3). From December 24, 1957, to December 27, 1957, petitioner was a patient at the Cedarcroft Sanitarium and Hospital, where her condition was diagnosed as "schizophrenic reaction, paranoid type." (R. 58, 68). She was admitted into the Johns Hopkins Hospital, Phipps Psychiatric Clinic, Baltimore, Maryland, where she remained undergoing treatment until January 16, 1958. (R. 5). Her release on January 16 was against the advice of the attending psychiatrist. (R. 49). She lived at home from January 16 to February 5, 1958. About February 1, 1958, she was seen at home by a private physician who insisted that she be taken to an institution. (R. 69-70) On February 5, 1958, she was re-admitted at Johns Hopkins Hospital, where she remained until May 23, 1958. Her condition was diagnosed at Johns Hopkins as "schizophrenic reaction, paranoid type." (R. 57). When she was released on May 23, 1958, she was considered improved but not cured and was advised to undergo further treatment by a private psychiatrist. (R. 57). On March 4, 1958, the Associate Director for Administration of the Bureau of Standards was notified in writing that petitioner was being treated at Johns Hopkins Hospital for mental illness and that a compensation claim would be filed for mental disability. (R. 59-66). On March 19, 1958, the Associate Director for Administration acknowledged the notification. (R. 66-67). Thereafter officials

of the Bureau of Standards and the Department of Commerce informed petitioner's mother that petitioner had three alternatives, namely, to resign, to be removed for cause, or to be separated by a reduction in force. (R. 5).

About March 26, 1958, without petitioner's knowledge, or authorization, a spurious reduction in force proceeding was commenced. (R. 16). On April 8, 1958 (R. 17) the Personnel Officer of the Bureau of Standards mailed a notice of reduction in force to petitioner's home in the District of Columbia although he knew that petitioner was then a patient in a hospital in Baltimore and that she was incapable of acting to protect her rights. (R. 6). A few days after April 8, 1958, petitioner's mother took the notice to the hospital and showed it to petitioner, but petitioner's condition was such that she was incapable of taking any action with respect to it, or otherwise acting to protect her rights. (R. 6). She did not file an appeal within ten days after she received the notice.

Petitioner was convinced that she had never suffered from any mental disorder and that her separation from employment and her hospitalization for mental illness was caused by a Communist conspiracy, which was really aimed at her mother. (R. 6-7, 67-70). In early June, 1958, petitioner visited the Civil Service Commission and was given a publication containing language which she understood to mean that she had ninety days in which to file an appeal from the notice of reduction in force. (R. 19, 38). On August 30, 1958, she filed an appeal (R. 19) with the Appeals Examining Office of the Civil Service Commission, in which she explained that she had not been able to appeal within ten days because she was in the hospital, and she enclosed a copy of the March 4, 1958, notification to the Associate Director for Administration of the Bureau of Standards (R. 59-66) that she was being treated at Johns Hopkins Hospital for mental illness and that a compensation claim would be

filed for mental disability. She also referred to the ninety-day language in the publication she had been given in June, and complained that the procedure employed to separate her deprived her of her civil rights and of the rights and privileges of a career Civil Service employee.

The Chief of the Appeals Examining Office on September 8, 1958 (R. 20) rejected the appeal on the ground that petitioner had not filed it within ten days and had not "furnished us with any basis which would enable us to waive the ten-day requirement for filing a reduction in force appeal." He further informed the petitioner that the Commission might extend the ten-day limitation if an employee could show that he was not informed of the limitation, or was unaware of it, or that circumstances beyond his control prevented him from filing an appeal within the ten days. He arrived at this conclusion as the result of an obvious mistake in his reading of petitioner's explanation that she had not been able to file the appeal within ten days because she was in the hospital at the time. Thereafter petitioner diligently sought to obtain counsel, but all the lawyers that she talked to declined to handle her case when she told them that Communists were responsible for her loss of job and hospitalization. (R. 7). On October 13, 1958, the Board of Appeals and Review of the Civil Service Commission affirmed the decision of the Appeals Examining Office, on the somewhat different ground that petitioner had made no showing that circumstances beyond her control prevented her from filing her appeal *before August 30*, and that in the absence of such a showing there was no valid justification for waiving the time limit in her case. (R. 23). Still unable to obtain an attorney, on January 7, 1959, she again wrote to the Civil Service Commission requesting a hearing (R. 25), and on the same day delivered to the Commission a 19-page statement in which, among other things, she denied that she had ever been of unsound mind, charged that she had been a Communist

prisoner at Johns Hopkins Hospital, and stated that she was still being shadowed by Communists and that chemicals in the gaseous state had been introduced into her apartment by Communists (R. 47-60). This document was referred to the Board of Appeals and Review along with another letter of petitioner, dated January 12, 1959 (R. 26, 29), in which petitioner pointed out that the Chief of the Appeals Examining Office

> "misinterpreted my letter of August 30, 1958, to the C. S. C. where I explained clearly that I could not comply with the ten day limit to file an appeal because I was at the Johns Hopkins Hospital under conditions beyond my control. If due consideration would have been paid to this legitimate explanation all the ensuing correspondence would not have been necessary. In all correspondence, no mention is ever made of this explanation I first offered. Even the BAR seems to have overlooked this point, otherwise it would have discussed it in some of the letters to me."

On May 7, 1959 (R. 30) the Chairman of the Board of Appeals and Review returned the 19-page document to petitioner and said:

> "It is not considered that the material submitted by you in any way justifies an acceptance of your delayed appeal. Accordingly, the previous decision of the Board, issued on October 13, 1958, stands.
>
> Your enclosures are returned herewith."

In 1960 petitioner obtained an attorney and a complaint was filed in the United States District Court for the District of Columbia requesting a declaratory judgment and mandatory injunction reinstating her in her position. She alleged in her complaint (R. 1-30), among other things, that the reason given for the reduction in force, namely, shortage of funds, was false (R. 6), that her position was not abolished and that there was no intention of abolishing it at the time of the notice of April 8,

1958; that there was no lack of funds to support her work; that there were other employees in her competitive level with lower retention preference ranking than petitioner who were not separated; that there was a shortage of Chemists in her grade and lower, in the Bureau of Standards, and they were being sought by the Bureau at the very time it separated her; and that the reduction in force proceeding was a sham and subterfuge and was in reality an attempted removal for cause.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below probably conflicts with applicable decisions of this Court. In *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, this Court established the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. This rule was followed in *Covey* v. *Somers*, 351 U.S. 141, and in *Walker* v. *Hutchinson*, 352 U.S. 112. In the *Covey* case real property owned by a mentally incompetent person was foreclosed and sold for the incompetent's failure to pay town taxes. Notice of the foreclosure proceeding was given to the incompetent, as required by statute, but at a time when she was without the protection of a guardian. Subsequently a committee was appointed for the incompetent, but the lower (state) courts denied the committee's motion to open the incompetent's default in the foreclosure proceeding. This Court said, at page 146:

> "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . (w)hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such

as one desirous of actually informing the absentee might reasonably adapt to accomplish it.' Mullane v. Central Hanover Bank & Trust Company, 339 U.S. 306, 314, 315, 94 L. ed. 865, 873, 874, 70 S. Ct. 652.

"Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncontroverted assertions, that the taxpayer Nora Brainerd was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

That a Government employee has a legally protected interest in his employment was noted in *Slochower* v. *Board of Education*, 350 U.S. 551, 555, in these words:

"To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by proper authorities . . ."

In *Wieman* v. *Updegraff*, 344 U.S. 183, 192, the Court said:

". . . constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

2. The court below has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided it erroneously. In the interest of assuring justice for many thousand of Federal employees it is important that administrative officials of Federal departments and agencies be informed of the safeguards that must be observed under the Constitution

and applicable Federal laws and regulations in cases where reduction in force proceedings are instituted against employees who are mentally or physically disabled from acting effectively to protect their interests, or of understanding the nature of the proceeding brought against them. Whether or not there is a relative or only an absolute increase in the numbers of mentally ill persons in the United States, and whether or not the increase is due in whole or in part to improved techniques for the recognition and understanding of mental illness, it is common knowledge that the incidence of mental disorders of various kinds is increasing. Government employees are not immune.

This Court has said that "where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process . . ." *Greene* v. *McElroy*, 360 U.S. 474, 507. The failure of the employing agency and the Civil Service Commission in this case to make due allowance for the special problems and special handicap of an employee then in a mental institution under treatment for a serious mental disorder, or even to recognize the basic unfairness of holding such an employee to a rigid ten-day limitation for filing an appeal, demonstrates beyond doubt that there is a need for a ruling by this Court on this vitally important question.

In this case the employee was not only handicapped personally. She was further handicapped by an obvious mistake made by the Chief of the Appeals Examining Division in his reading of her appeal, and it was upon his own mistake that he based his denial of an extension of time to the petitioner, and it was upon the same mistake that the Board of Appeals and Review based its affirmance of the decision of the Appeals Examining Office. Thus there is involved in this case the further question

of whether it was arbitrary and capricious for administrative authorities to base their refusal to consider an appeal on its merit upon their own obvious mistake, and whether this is not also a denial of due process when it had the effect of depriving the petitioner of her constitutionally protected interest in a position in the employ of the Government. The words of Mr. Justice Douglas in his concurring opinion in *Peters* v. *Hobby*, 349 U.S. 331, 352, are applicable:

> ". . . It deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of man's most precious liberties is his right to work. When a man is deprived of that 'liberty' without a fair trial, he is denied due process . . ."

Although the above-quoted words were used in a different situation, where the loss of a job was predicated on the statements of "faceless informers," it surely is no less unfair to predicate the loss of a job upon a manifest distortion of an employee's own words.

The Board of Appeals and Review, in its affirmance (R. 23) of the decision of the Appeals Examining Office, compounded the error by importing a brand new requirement into the regulations, of which petitioner had no notice when she filed her appeal, and which she could not have anticipated, namely, *the requirement that the* appealing employee must make a showing that he was prevented by circumstances beyond his control from filing his appeal *sooner than he did*. On the basis of this *ex post facto* rule-making the Board of Appeals and Review affirmed the rejection of petitioner's appeal. And the Board of Appeals and Review found nothing in the 19-page document (extracts R. 67-70) that "in any way justifies acceptance" of the "delayed appeal." (R. 30).

Under Section 12 of the Veterans Preference Act of 1944, Act of June 27, 1944, c. 287, 58 Stat. 390 (see Appendix B, p. 18), and the regulations promulgated by

the Civil Service Commission to implement Section 12, known as the Retention Preference Regulations for Use in Reduction in Force, Part 20, 5 CFR, in effect on April 8, 1958 (5 CFR, 1957 Supp. 20.9; see Appendix B, p. 19), it was provided that any employee notified of proposed action in a reduction in force "who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission, stating reasons for believing the proposed action to be improper, within ten (10) days after the date he received notice of the proposed action . . ." The regulation, it may be noted, presupposes sufficient mental capacity and health on the part of the affected employee for him to be able to form a rational belief as to whether or not his rights under the regulations have been violated. If there is substantial evidence available to the Commission that an employee is under a mental disability that would prevent his forming a rational belief as to whether his rights have been violated, it would appear that the intent of the regulations and the underlying law would require action on the part of the Commission that would protect the rights and interest of the employee. If, due to a temporary disability, whether physical or mental, an employee is prevented from filing an appeal, from discovering and assembling the facts upon which to base his appeal, or from obtaining an attorney, then it would appear that the intent of the law and regulations would require the Commission to suspend the matter pending the passing of the disability, or the obtaining of representation, or the appointment of a legal guardian or committee, and to actively seek the appointment of a legal guardian or committee if necessary to protect the rights of the employee.

Under the provisions of Section 19 of the Veterans Preference Act (Act of June 27, 1944, c. 287, Sec. 19, 58 Stat. 391; see Appendix B, p. 19), it is "the authority

and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose" of the Act. Certainly this section of the Act must have imposed upon the Commission the duty to make, and to itself comply with, fair and reasonable rules appropriate to the situation of a civil service employee under a mental or physical disability causing a delay in the filing of his appeal. See also the Act of June 27, 1944, c. 287, Sec. 11, 58 Stat. 390, 5 USC 860. (App. B, p. 18).

The practice and policy of the Civil Service Commission at the time petitioner filed her appeal was to waive and extend the time limit if the employee could show that circumstances beyond his control prevented filing of his appeal within the ten-day period. This policy was set out in the letter of the Chief of the Appeals Examining Office to the petitioner dated September 8, 1958 (R. 20), and was based on the following language in the Federal Personnel Manual, page R-4-33 (issued with Transmittal Sheet No. 567):

> "This time limit may be extended only if the employee shows to the Commission's satisfaction that circumstances beyond his control prevented him from filing his appeal within the ten-day period."

When petitioner filed her appeal on August 30, 1958, that policy and regulation were in effect. The Retention Preference Regulations for Use in Reduction in Force, in effect when the notice was mailed to petitioner, and when she filed her appeal on August 30, 1958, are shown in Appendix B hereto, p. 19. They did not then expressly provide for an extension of the time limit, although such a provision may reasonably be implied, as suggested above. They did provide expressly that the Commissioners could reopen and reconsider any previous decision. However, on September 24, 1958, 23 F. R. 7421,

those regulations were amended to expressly provide for an extension of time "upon a showing that circumstances beyond the control of the appellant or the employing agency prevented the filing of the appeal within the prescribed time limit." See Appendix B, p. 20) The amended regulations were in effect when the Board of Appeals and Review, on October 13, 1958, affirmed the decision of the Appeals Examining Office rejecting petitioner's appeal. (R. 23)

It seems, therefore, that the Civil Service Commission had ample authority to accept petitioner's appeal of August 30, 1958, and to consider the appeal on its merits, and that its refusal to do so was arbitrary and discriminatory and in violation of the applicable statutes and regulations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANDREW A. LIPSCOMB
Counsel for Petitioner

(Reprinted as amended 12-6-61)

APPENDIX A

Filed November 9, 1961, Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16293

SENTA S. ROGERS, APPELLANT

v.

LUTHER H. HODGES, Secretary of Commerce, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided November 9, 1961

Mr. Andrew A. Lipscomb for appellant.

Mr. Robert Brewer Norris, Assistant United States Attorney, with whom *Messrs. David C. Acheson*, United States Attorney, *Charles T. Duncan*, Principal Assistant United States Attorney, and *Harold D. Rhynedance, Jr.*, Assistant United States Attorney, were on the brief, for appellees. *Mr. Nathan J. Paulson* entered an appearance for appellees.

Before MR. JUSTICE REED, retired,* and EDGERTON and FAHY, *Circuit Judges*.

PER CURIAM: The plaintiff appeals from a judgment for the defendant in a suit for reinstatement in plaintiff's former position in the National Bureau of Standards.

* Sitting by designation pursuant to Sec. 294(a), Title 28, U. S. Code.

The Board of Appeals and Review of the Civil Service Commission denied appellant's application for a delayed appeal from her discharge resulting from a reduction in force on the ground that "While you were hospitalized until May 23, you have made no showing that circumstances beyond your control prevented you from filing your appeal before August 30, and in the absence of such a showing, there is no valid justification for waiving the time limit in your case."

It does not appear that the administrative officials failed to follow correct procedures or that they acted arbitrarily, either in rejecting her original request for an extension on the basis of the reasons she had then submitted or in not exercising their discretion to reconsider their action under 23 F.R. 7421-7423 (Sept. 24, 1958), 5 C.F.R. 20.9(e) (1961). Appellant did not attempt to show the Board any reason for her failure to meet their objection. Of course, we do not pass on the question of the propriety of the Civil Service Commission's rejection of her appeal if, in the future, she adequately explains to that agency her failure to take timely action.

Affirmed.

Filed November 9, 1961, Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Civil 1984-60

No. 16,293

SENTA S. ROGERS, APPELLANT

v.

LUTHER H. HODGES, Secretary of Commerce, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: Mr. Justice Reed, retired, and Edgerton and Fahy, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam

Dated: November 9, 1961.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

Statutes

* * * *

Act of June 27, 1944, c. 287, Sec. 11, 58 Stat. 390, 5 USC 860:

> "The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this chapter."

Act of June 27, 1944, c. 287, Sec. 12, 58 Stat. 390, 5 USC 861:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings; Provided, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided further, That preference employees whose efficiency ratings are below "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

Act of June 27, 1944, c. 287, Sec. 19, 58 Stat. 391, 5 USC 868:

"It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this chapter and such Executive orders as may be issued pursuant thereto and in furtherance thereof: Provided, That any recommendation by the Civil Service Commission, submitted to any Federal agency, on the basis of the appeal of any preference eligible, employee or former employee, shall be complied with by such agency."

Regulations

5 CFR 1957, Supp. 209, 21 F.R. 8915, Nov. 16, 1956:

"(a) Employee appeals to Commission. Any employee notified of proposed action in a reduction in force who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission, stating reasons for believing the proposed action to be improper, within ten (10) days after the date he received notice of the proposed action (or supplementary notice specifying different adverse action), or within ten (10) days after a decision by the agency on his answer to any notice giving him an opportunity to answer.

"(b) Further appeals. The Commission office that makes the initial adjudication of an appeal submitted pursuant to paragraph (a) of this section shall notify the employee, or his designated representative, and the agency of the decision in writing. The written decision shall contain notification of the right of either party to appeal to the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D.C. (referred to in this section as the 'Board'), within seven (7) days after receipt of such decision.

"(c) Finality of decisions. It is mandatory for the agency to take corrective action in accordance with the decision of the Commission office that made the

initial adjudication of the appeal, unless an appeal is made to the Board. The decision of the Board shall be final. There is no further right of appeal. A recommendation for corrective action by the Board is mandatory and must be complied with by the agency.

"(d) The Commissioners. The Commissioners may, in their discretion, when, in their judgment, such action appears warranted by the circumstances, reopen and reconsider any previous decision."

23 F.R. 7421, Sept. 24, 1958 (amending 5 CFR 1957 Supp. 20.9):

"Section 20.9 appeals— (a) Employee appeals to the Commission. Any employee who receives a specific notice of reduction in force and who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission stating reasons why he believes the action to be taken or taken is improper. The appeal may be filed at any time from the date the employee receives the notice but not later than ten (10) calendar days after the effective date of the action.

"(b) Further appeals. The Commission office that makes the initial adjudication of an appeal submitted pursuant to paragraph (a) of this section shall notify the employee, or his designated representative, and the agency of the decision in writing. The written decision shall contain notification of the right of either party to appeal to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C. (referred to in this section as the 'Board'), within seven (7) calendar days after receipt of such decision.

"(c) Extension of time limit. The time limits specified in paragraphs (a) and (b) of this section may be extended upon a showing that circumstances beyond the control of the appellant or the employing agency prevented the filing of an appeal within the prescribed time limit.

"(d) Finality of decisions. It is mandatory for the agency to take corrective action in accordance with the decision of the Commission office that made the initial adjudication of the appeal, unless an appeal is made to the Board. The decision of the Board shall be final. There is no further right of appeal. A recommendation for corrective action by the Board is mandatory and must be complied with by the agency.

"(e) The Commissioners. The Commissioners may, in their discretion, when, in their judgment, such action appears warranted by the circumstances, reopen and reconsider any previous decision."

Federal Personnel Manual, page R-4-3 (Issued with Transmittal Sheet No. 567):

* * * * *

"This time limit may be extended only if the employee shows to the Commission's satisfaction that circumstances beyond his control prevented him from filing his appeal with the ten-day period."

5 CFR 9.102(a)(1), 19 F.R. 8615, Dec. 16, 1954:

"(1) Actions against employees. (i) No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and for furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practicable date with a written decision. In the decision that removal or other adverse action will be taken, the agency shall notify the employee of the reasons for

the action and the effective date of the action; also of the right of the employee to appeal to the appropriate office of the Commission and the time limit within which his appeal must be submitted as provided in section 9.106. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action shall be made a part of the records of the agency concerned."

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 769

SENTA S. ROGERS

v.

LUTHER H. HODGES, Secretary of Commerce, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order, findings of fact and conclusions of law of the United States District Court for the District of Columbia (J.A. 71-73) are unreported.[1] The opinion of the United States Court of Appeals for the District of Columbia Circuit, as amended (Pet. App. A, pp. 15-16), is reported at 297 F. 2d 435.

[1] "J.A." refers to the Joint Appendix filed with the court of appeals below, which is now on file in this Court.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1961 (Pet. App. A, p. 17). A timely petition for rehearing was denied by the court en banc on December 6, 1961, and the opinion was amended on that date (Pet. App. A, p. 15-16). The petition for a writ of certiorari was filed on March 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Civil Service Commission abused its discretion in declining to consider petitioner's untimely appeal from her separation from federal employment through a reduction in force.

REGULATIONS INVOLVED

The pertinent regulations of the Civil Service Commission provide as follows:

21 F.R. 8915, 5 CFR 20.9 (November 16, 1956):

> (a) *Employee appeals to Commission.* Any employee notified of proposed action in a reduction in force who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission, stating reasons for believing the proposed action to be improper, within ten (10) days after the date he received notice of the proposed action (or supplementary notice specifying different adverse action), or within ten (10) days after a

decision by the agency on his answer to any notice giving him an opportunity to answer.

(b) *Further appeals.* The Commission office that makes the initial adjudication of an appeal submitted pursuant to paragraph (a) of this section shall notify the employee, or his designated representative, and the agency of the decision in writing. The written decision shall contain notification of the right of either party to appeal to the Board of Appeals and Review, U.S. Civil Service Commission, Washington 25, D. C. (referred to in this section as the 'Board'), within seven (7) days after receipt of such decision.

(c) *Finality of decisions.* It is mandatory for the agency to take corrective action in accordance with the decision of the Commission office that made the initial adjudication of the appeal, unless an appeal is made to the Board. The decision of the Board shall be final. There is no further right of appeal. A recommendation for corrective action by the Board is mandatory and must be complied with by the agency.

(d) *The Commissioners.* The Commissioners may, in their discretion, when, in their judgment, such action appears warranted by the circumstances, reopen and reconsider any previous decision.

23 F.R. 7421, 5 CFR 20.9 (September 24, 1958):

Section 20.9 appeals—(a) *Employee appeals to the Commission.* Any employee who receives a specific notice of reduction in force and who believes that the regulations in this part have not been correctly applied may appeal to the appropriate office of the Commission stating reasons why he believes the action to be taken

or taken is improper. The appeal may be filed at any time from the date the employee receives the notice but not later than ten (10) calendar days after the effective date of the action.

(b) *Further appeals.* The Commission office that makes the initial adjudication of an appeal submitted pursuant to paragraph (a) of this section shall notify the employee, or his designated representative, and the agency of the decision in writing. The written decision shall contain notification of the right of either party to appeal to the Board of Appeals and Review, U. S. Civil Service Commission, Washington 25, D. C. (hereinafter referred to as the 'Board') within seven (7) calendar days after receipt of such decision.

(c) *Extension of time limit.* The time limits specified in paragraphs (a) and (b) of this section may be extended upon a showing that circumstances beyond the control of the appellant or the employing agency prevented the filing of an appeal within the prescribed time limit.

(d) *Finality of decisions.* It is mandatory for the agency to take corrective action in accordance with the decision of the Commission office that made the initial adjudication of the appeal, unless an appeal is made to the Board. The decision of the Board shall be final. There is no further right of appeal. A recommendation for corrective action by the Board is mandatory and must be complied with by the agency.

(e) *The Commissioners.* The Commissioners may, in their discretion, when, in their judgment, such action appears warranted by the circumstances, reopen and reconsider any previous decision.

* * * *

The Federal Personnel Manual, page R-3-33 (issued with Transmittal Sheet No. 567), provides:

* * * *

> This time limit may be extended only if the employee shows to the Commission's satisfaction that circumstances beyond his control prevented him from filing his appeal within the ten-day period.

STATEMENT

On June 27, 1955, petitioner began employment in the National Bureau of Standards of the Department of Commerce with a career-conditional appointment as a Chemist (General), Grade GS-9 (J.A. 3, 12). On March 10, 1957, she was promoted to Grade GS-11 (J.A. 3, 13).

On March 26, 1958, it was decided to abolish the position then assigned to petitioner, because of insufficient funds (J.A. 16). Consequently, the petitioner was advised by letter dated April 8, 1958, that she would be separated from her position, effective May 31, 1958, because of a reduction in force. This notice also advised petitioner that she had a right to appeal the separation to the Civil Service Commission within ten days (10) days of receipt of the notice (J.A. 17-18). Petitioner did not appeal within ten days of receipt of the notice which occurred "a few days after April 8, 1958" (J.A. 6, 19); and she was thereafter separated on May 31, 1958.

By letter dated August 30, 1958, petitioner attempted to appeal her separation to the Appeals Examining Office of the Civil Service Commission,

alleging that she was in the hospital when she received the separation notice; that she could not comply with the ten-day appeal limitation because of her hospitalization; and that she was in the hospital until May 23, 1958 (J.A. 19-20).

In a letter of September 8, 1958, the Appeals Examining Office informed petitioner that it could not consider her untimely appeal (J.A. 20-22). This letter advised petitioner that, before consideration could be given the merits of her appeal, she had to explain why she had not complied with the ten-day limitation. It was pointed out that, under applicable regulations, the Civil Service Commission may extend the ten-day appeal limitation only if an employee shows that he was not aware of the limitation, or that circumstances beyond his control prevented compliance with it. *Supra*, pp. 4, 5. The letter further stated that, on the basis of its appraisal of petitioner's representations, the Appeals Examining Office had concluded that she had not made an adequate showing of unawareness or inability to comply (J.A. 21). Petitioner was informed of her right to appeal further to the Board of Appeals and Review within seven days of receipt of the letter (J.A. 22).

By letter to the Board of Appeals and Review, dated September 16, 1958, petitioner indicated that she had received the letter of the Appeals Examining Office on September 10, 1958, and requested an extension of the seven-day period in which to file a further appeal (J.A. 22). On September 22, 1958, the Board of Appeals and Review granted petitioner's request for an extension of time and advised her that

she could appeal within ten days of receipt of that letter (J.A. 23).

Petitioner did not communicate with the Board of Appeals and Review within the extended ten-day period. Accordingly, the Board considered her case on the material before it. In a letter of October 13, 1958, the Board affirmed the action of the Appeals Examining Office. The Board concluded that petitioner had not established any justification for waiving the initial ten-day time limitation in her case. With respect to the effect of her hospitalization, the Board said (J.A. 24):

> While you were hospitalized until May 23, you have made no showing that circumstances beyond your control prevented you from filing your appeal before August 30, and in the absence of such showing, there is no valid justification for waiving the time limit in your case.

On January 7, 1959, and on January 12, 1959, petitioner communicated with the Commission requesting reconsideration of the Board's action of October 13, 1958 (J.A. 25-28). On January 19, 1959, petitioner was informed by the Commission that all the material in her case would be reviewed for further consideration (J.A. 29). On May 7, 1959, she was informed that the material submitted did not justify consideration of her untimely appeal (J.A. 30).

On June 27, 1960, petitioner brought this suit in the district court against the Secretary of Commerce, the Director of the Bureau of Standards, and the Civil Service Commissioners. The complaint re-

quested a declaratory judgment and a mandatory injunction requiring respondents to restore petitioner to her position at the National Bureau of Standards with back pay (J.A. 1). On October 12, 1960, respondents filed a motion for summary judgment or, in the alternative, to dismiss the complaint (J.A. 31). On January 5, 1961, after argument, the district court granted respondents' motion for summary judgment (J.A. 71). Findings of fact and conclusions of law were filed by the district court on January 16, 1961 (J.A. 71-73).

On petitioner's appeal, the court of appeals affirmed. It held (Pet. App. A, p. 16):

> It does not appear that the administrative officials failed to follow correct procedures or that they acted arbitrarily, either in rejecting her original request for an extension on the basis of the reasons she had then submitted or in not exercising the discretion to reconsider their action under 23 F.R. 7421, 7423 (Sept. 24, 1958), 5 C.F.R. 20.9(e) (1961).
>
> Appellant did not attempt to show the Board any reason for her failure to meet their objection. Of course, we do not pass on the question of the propriety of the Civil Service Commission's rejection of her appeal if, in the future, she adequately explains to that agency her failure to take timely action.

ARGUMENT

Under the regulations of the Civil Service Commission, not challenged here, the merits of an untimely appeal to the Commission by a separated classified

employee can be considered only if the employee shows to the Commission's satisfaction that circumstances beyond his or her control prevented compliance with the ten-day time limitation. *Supra*, pp. 4, 5. Both courts below have determined that petitioner had not made such a showing and that, therefore, the Commission did not act arbitrarily in declining to consider her appeal on its merits. This determination turned upon the particular facts of the case and is plainly correct. Further review is not warranted.[2]

Petitioner received notice of her separation, and of her right to appeal within ten days, "a few days after April 8, 1958" (J.A. 6, 17). Yet she did not appeal until August 30, 1958, some four and one half months later. Her appeal was approximately four months late. She suggests that the fact that she was hospitalized at the time she received the notice prevented her compliance with the ten-day limitation. Yet she admits that her hospitalization terminated—*i.e.*, her disability to comply with the regulation was removed—on May 23, 1958. Nevertheless 98 days elapsed from the time she was released from the hospital until she appealed. It cannot be said that the period of hospitalization, standing alone, constituted a circumstance beyond her control preventing timely filing of her appeal.

In this connection, petitioner restricted her showing before the Commission to the fact that she was hos-

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[2] In the event the Court grants certiorari, respondents may assert, as an alternative basis for affirmance, that this action was barred by laches.

pitalized until May 23, 1958. She did not make known to the Commission the nature of her illness. At no point during the Commission proceedings did she indicate that she was being treated for a mental condition or that her mental capacities were impaired to an extent that she did not understand the reduction-in-force notice.[3] Thus, the Board of Appeals and Review justifiably concluded that, even if the ten-day limitation should have been stayed for the period of hospitalization, there was no explanation for the more than three months delay following the ending of the hospitalization.[4]

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[3] For this reason, petitioner's reliance upon *Covey* v. *Town of Somers*, 351 U.S. 141, holding that notice to a known and legally adjudged mental incompetent is inadequate, is unavailing. The other two "inadequate notice" cases cited by petitioner, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, and *Walker* v. *Town of Hutchinson*, 352 U.S. 112, are equally inapposite since they involved notice by publication, not actual notice.

[4] It should be noted that the court of appeals, in its amended opinion, virtually invited petitioner to return to the Commission with additional information which might warrant a reopening of her case under 23 F.R. 7421-7423 (Sept. 24, 1958), 5 C.F.R. 20.9(e) (1961). *Supra*, p. 8.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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